CHEAH SHU BOON

v.

AMERICAN HOME ASSURANCE COMPANY

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-12-448-1999]
24 MAY 2000

CIVIL PROCEDURE: *Default judgment - Setting aside - Defence on the merits, whether any - Whether 'arguable defence' sufficient - Whether there must be 'real prospect of success' - Whether court must have formed a provisional view of the probable outcome of the case*

INSURANCE: *Motor insurance - Duty of disclosure - Whether there was non-disclosure of material facts - Materiality of facts to contract of insurance - Whether nature of insurer's risk altered*

The plaintiff filed a summons against the defendant. On the return date of the summons, the defendant failed to appear in court or to file and serve upon the solicitors for the plaintiff the requisite notice of appearance. The solicitors for the plaintiff then proceeded to enter judgment in default of appearance against the defendant ('the default judgment'). The defendant filed a notice of application ('the application') to set aside the default judgment. The sessions judge allowed the application and ordered that the default judgment be set aside. The plaintiff appealed.

The defendant's case was anchored on two grounds, namely: (a) that it had a defence on the merits against the plaintiff as the plaintiff had failed to disclose material facts, thereby entitling the defendant as insurers to repudiate the policy; and (b) that the default judgment for the sum of RM200,000 was not for a liquidated sum and therefore the default judgment was irregular and had to be set aside.

The main issue for consideration was whether the defendant had succeeded in showing a defence on the merits.

Held:

[1a] The primary consideration in exercising the discretion was whether the defendant had merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there was no point setting aside the default judgment if the defendant had no defence, and because if the defendant could show merits, the court would not *prima facie* let a judgment pass on which there was no proper adjudication.

[1b] It is not sufficient to show a merely "arguable" defence that would justify leave to defend under O. 14 Rules of the High Court 1980; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.

[2a] The affidavit evidence revealed that the agent for the defendant had, from the inception, knowledge of the theft of the plaintiff's other vehicle. The defence of non-disclosure of material facts entitling the defendant to repudiate liability under the policy therefore failed.

[2b] In any event, the theft of the plaintiff's other vehicle and the plaintiff's ownership of two other vehicles could not in the circumstances be said to be material so as to lead to an inference that the vehicle insured by the defendant in this case was not an ordinary risk.

[3] On the judgment sum of RM200,000, the defendant had failed to show that the sum was not representative of the value of the vehicle at the material time. The *bona fides* and conduct of the defendant in the application was questionable.

[Appeal allowed.]

Case(s) referred to:

Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc The Saudi Eagle [1986] 2 Lloyd's Rep 221 ***(foll)***
Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd [1999] 1 CLJ 179 ***(foll)***
China Insurance Co Ltd v. Ngau Ah Kau [1972] 1 MLJ 52 ***(dist)***
Keeling v. Pearl Assurance Co Ltd [1923] All ER Rep 307 ***(foll)***
Panwell Investments Pte Ltd v. Lau Ee Theow [1995] 3 SLR 137 ***(dist)***
Syarikat Uniweld Trading v. Asia Insurance Co Ltd [1996] 3 CLJ 142 ***(refd)***
Titiria Sdn Bhd v. Zurich Insurance (Malaysia) Sdn Bhd [1996] 1 CLJ 105 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 91, 92
Insurance Act 1963, s. 44A
Rules of the High Court 1980, O. 13 r. 5

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 25, paras 367, 368, 467

For the plaintiff - SL Toh; M/s SB Cheah & Assoc
For the respondant - Khoo Eng Chin; M/s Khoo & Sidhu

Reported by Mariette Peters-Goh

JUDGMENT

Faiza Tamby Chik J:

This is an appeal filed by the plaintiff against the decision of the learned judge delivered on 14 December 1999 which allowed the application of the defendant to set aside the judgment in default of appearance taken against the plaintiff on 7 July 1999. A copy of the relevant order is shown in pp. 1-3 of the Supplementary Record of Appeal. On 11 April 1999, the plaintiff had filed a summons against the defendant. The particulars of the plaintiff's claim against the defendant are as stated in the statement of claim dated on the same date. (Pages 1-10 of the Record of Appeal). The said summons was duly served on the defendant, a fact not disputed by the defendant. On 7 July 1999, the return date of the said summons, the defendant had failed to appear in court or to file and serve upon the solicitors for the plaintiff the requisite notice of appearance. As a consequence thereof, the solicitors for the plaintiff proceeded to enter judgment in default against the defendant (hereinafter referred to as "the default judgment") which judgment in default were taken in the following terms (p. 1-2 of the Second Supplementary Record of Appeal):

(i) The defendant is ordered to pay the plaintiff the sum of RM200,000 with interests thereon at the rate of 8% from 11 May 1999 till the date of full realisation thereof (hereinafter referred to as "the first limb");

(ii) The defendant is ordered to pay the plaintiff damages to be assessed; and

(iii) Interest on the sum so assessed at 8% from 11 May 1999 till date of full realisation thereof and costs to be determined.

(Items (ii) and (iii) shall hereinafter collectively be referred to as "the second limb").

The defendant had on 21 September 1999, filed a notice of application (pp. 16-19 of the Record of Appeal) seeking *inter alia*, to set aside the default judgment taken against them (hereinafter referred to as "the application"). The learned judge had allowed the application and ordered that the default judgment to be set aside, hence the plaintiff's present appeal before this court.

The defendant had stated essentially two grounds in support of their application, namely (p. 17-18 of the Record of Appeal):

(i) The defendant had a defence on the merit against the plaintiff's claim in that as the plaintiff had failed to disclose to the defendant (an insurer) material facts, the defendant was entitled to repudiate the relevant insurance policy; and

(ii) The judgment in default taken for the sum of RM200,000 was not for a liquidated sum and therefore the said judgment in default was irregular and had to be set aside.

The defendant by the averments contained in the affidavit of Lim Joo Siew (pp. 220 -57 of the Record of Appeal) alleged that the plaintiff had failed to disclose to the defendant in relation to the insurance policy issued by the defendant in respect of the plaintiff's vehicle, the following facts. That the plaintiffs owned two other vehicles; and that the plaintiff's has had a previous claim in respect of the theft of the plaintiff's other vehicle from QBE Insurance (M) Bhd. The plaintiff by its affidavit in reply (pp. 58-87 of the Record of Appeal) averred that the abovestated facts had been made known to JL Transurance Services (hereinafter referred to as "the agent"), an authorised agent of the defendant at the time of the relevant proposal forms were completed. The said proposal forms had been completed by the agent. The fact that JL Transurance Services was the authorised agent of the defendant was not disputed. (p. 86 of the Record of Appeal). Further, by the affidavit of Goh Hua Kiew (hereinafter referred to as 'Goh'). (pp. 100-103 of the Record of Appeal) affirmed on behalf of the plaintiff, Goh who is the Business Development Manager for QBE Insurance (M) Bhd. (hereinafter referred to as "QBE"), had averred that he had referred the plaintiff's case to the agent as Goh had been unable to arrange an insurance policy for the plaintiff from QBE in view of the plaintiff's pending claim with QBE in respect of the theft of the plaintiff's other vehicle. GOH had further averred that the fact of the loss of the plaintiff's other vehicle and the pending claim with QBE had fully disclosed to the agent prior to and at the time of issuance of the relevant insurance policy by the defendant. Therefore the inevitable conclusion to be arrived at from the facts deposed in the affidavits affirmed and filed by the respective parties, is that it would be impossible for the agent not to have known of the theft of the plaintiff's vehicle as the plaintiff was referred to the agent by Goh, a representative of QBE, an insurance company offering similar insurance products. The circumstances were such that the agents curiosity would have naturally been aroused by such a reference made by a representative of another insurer, which for some reason was unable to provide insurance for the plaintiff. It is therefore noted that the agent did in fact know and was aware of the facts in respect of the theft of the plaintiff's other vehicle. The agent's knowledge was hence imputed to the defendant.

In *Syarikat Uniweld Trading v. Asia Insurance Co. Ltd.* [1996] 3 CLJ 142 the court held:

Held:

[1] The agent and the manager both knew that from the nature of the business undertaken by the appellant there was a possibility that the workshop might catch fire. It was with this knowledge that the manager accepted the appellant's form and thereafter issued the cover note. Therefore, from the available evidence and by virtue of s. 44A of the Insurance Act 1963, the agent in the present appeal was the authorised agent of the respondent insurer and any knowledge that the agent possessed was deemed to be the knowledge of the respondent insurer.

....

Per Curiam:

In construing s. 44A of the Insurance Act 1963, it must be held that an authorised agent of the insurer who solicits or negotiates a contract of insurance in such capacity must be given a wide scope of jurisdiction so as to cover not only explicit and expressed authority but also apparent or ostensible authority. Thus, if the insured allows an authorised agent to fill the proposal form for him, and the insured gives the correct answers but the answers were falsely written down by the agent, then the agent remains throughout as the agent of the insurer. This interpretation is in accordance with the accepted canon of construction that a commercial document, like an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that the provisions of the insurance policy receive a fair and sensible application. But if the insured allows or requests the authorised agent to fill the proposal form for him and gives permission, whether oral or in writing, to the agent to cough up with the answers to not only some but all the questions in the proposal form, the insured shall be deemed to have acquiesced in the falsification of the answers if he signs the proposal form. This is then said to be collusion or connivance between the authorised agent and the insured as envisaged in s. 44A(3)(a) of the Insurance Act 1963.

In *Chan Yoke Lain v. Pacific & Orient Insurance Co. Sdn. Bhd.* [1999] 1 CLJ 179 at p. 184, the Court of Appeal stated:

The particulars in the proposal form were filled up by the clerk of the agent. In that case the knowledge of the agent is to be imputed to the respondent company. In this respect, Bailhache J in *Keeling v. Pearl Assurance Co. Ltd.* [1923] All ER at p. 309 said:

> No doubt, if the answers had been given by the assured, or by her husband, the policy would be void, but the agent in this case has inserted answers which are not consistent with, and in one case are certainly directly contrary to, the information which he had from the husband. If the knowledge of the agent is to be imputed to the insurance company,

> or if in filing up the proposal form he was acting as the agent for the insurance company, then, in as much as the answers are his own answers and not the answers of the assured, the policy is undoubtedly good.

In this case, there is no allegation by the respondent company that there was collusion or connivance between the agent and the propose (deceased) or for that matter anybody else in the formation of the contract of insurance. Neither is there any allegation of fraud. By the deceased ratifying the proposal submitted by its agent by issuing a receipt for the premium received and the issuance of the PA policy, a valid contract was concluded (see *Borhanuddin bin Haji Jantara & Anor. v. American International Assurance Company Limited* [1986] 1 CLJ 532). It would be too late in the day for the respondent company to avoid liability by alleging that the signature on D2 was not that of the deceased.

In *Keeling v. Pearl Assurance Co. Ltd.* [1923] All ER Reprint 307, the headnotes reads:

> *Insurance – Agent – Proposal – Mis-statements in proposal form – Form signed in blank – Statements filled in by agent – True information given to agent – Effect on policy.*
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> Where the agent of an insurance company fills up a proposal form for the assured and the facts set down by the agent are contrary to the facts given him by the assured, the knowledge of the agent that the facts set down in the proposal form are untrue must be imputed to the insurance company, and the policy is not vitiated.
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> *Bawden v. London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, applied.

In *Titiria Sdn. Bhd. v. Zurich Insurance (Malaysia) Sdn. Bhd.* [1996] 1 CLJ 105 at p. 107, the High Court stated:

> The defendant's witness, Ivy, testified that before the issue of the policy she visited the premises and saw tyres being retreaded. The retreading of tyres involved the use of gum a volatile substance, and Ivy was therefore aware of the use of gum. This knowledge, by virtue of s. 44A of the Insurance Act 1963, became the knowledge of the defendant and it therefore cannot be said that the plaintiff, by failing to answer question 9 of the proposal, had failed to disclose the same as to affect the defendant's decision whether to insure the risk or not. What is clear from the evidence is that the defendant, despite the absence of an answer to question 9, still proceeded to issue the policy because Ivy was aware of the volatile substance and was prepared to accept the risk. In any event, though the answer to question 9 of the proposal form was not written down, the answer can be considered as having been provided by the plaintiff showing Ivy the premises where the volatile substance was used.

I am of the view that the case of *China Insurance Co. Ltd. v. Ngau Ah Kau* [1972] 1 MLJ 52 can be distinguished from the instant case as the following issues had not been considered in that case:

(a) The knowledge of the agent of the fact of the previous claim was imputed to the respondent insurer and was deemed to have been the knowledge of the respondent;

(b) Section 91 and 92 of the Evidence Act therefore had no application;

(c) Section 44A of the Insurance Act was not considered in that case. Whereas the case of *Syarikat Uniweld Trading v. The Asia Insurance Co. Ltd.* had considered in detail the effect of s. 44A and has distinguished the case of *Newsholme Brothers v. Road Transport and General Insurance Company*, upon which the decision in *China Insurance* was grounded.

It is observed that the defendant had repudiated the contract of insurance on the ground of non-disclosure of General Question 5(h). (see p. 43 of the Record of Appeal). By this, the defendant had clearly taken the position that the answer to General Question 5(a) was not a condition to the contract and that the answer to 5(a) was immaterial to them. It is a well-established principle that only the breach of a fundamental term or condition which went to the root of a contract would entitle the promisee to terminate or repudiate such a contract. In the case of insurance contracts, the court is entitled to question whether the fact alleged to have been suppressed or disclosed was in fact material to the contract. Consequently the contentions of the defendant that it has a defence on the merits, must therefore be rejected.

It is therefore I am of the view that the defence of non-disclosure of material fact advanced by the defendant in the instant case is one which was devoid of merit.

The defendant had alleged that the non-disclosure of the following two facts entitled the defendant to repudiate liability under the relevant insurance policy; the theft of the plaintiff's other vehicle; and the plaintiff ownership of two other vehicles. The test of whether a particular fact was material is as stated in para 367 and 368 *Halsbury's Laws of England* 4th edn, vol 25:

> 367. Material Facts. Apart from any stipulations in the contract limiting the field of disclosure, the rules for determining what facts are material to be disclosed have been codified in relation to marine insurance. After elimination of the factors peculiarly referable to marine insurance, these rules are generally applicable to all contracts of insurance. The basic test hinges upon whether the mind of a prudent insurer would be affected, either in deciding whether to take the risk at all or in fixing the premium, by knowledge of a particular

> fact if it had been disclosed. Therefore the fact must be one affecting the risk. If it has no bearing on the risk it need not be disclosed, and if it would do no more than cause the insurers to make inquiries, resulting no doubt in delay in issuing the insurance, it is not material if the result of the inquiries would have no effect on a prudent insurer. It is for the court to rule as a matter of law whether a particular fact is capable of being material and to give directions as to the test to be applied, but the decision ultimately is one of fact depending on the circumstances as proved in evidence. Rules of universal application are not therefore to be expected, but the propositions set out in the following paragraphs are well established.
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> ....
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> 368. Facts affecting the physical hazard. Any fact is material which leads to the inference, in the circumstances of the particular case, that the subject matter of insurance is not an ordinary risk, but is exceptionally liable to be affected by the peril insured against. This is referred to as the physical hazard.

Applying the said test to the circumstances of the instant case I am of the opinion that the said facts were not material in relation to the insurance policy issued by the defendant in favour of the plaintiff. It cannot be said that the fact that the plaintiff's other vehicle had been stolen for reasons not attributable to the default of the plaintiff and the fact that the plaintiff owned other vehicles could have any bearing on the decision of the defendant whether to take the risk of insuring the plaintiff's vehicle which is the subject matter of this suit. In addition, the fact that the plaintiff owned two other vehicles cannot be said to increase the risk faced by the defendant in insuring the plaintiff's vehicle.

It is noted that the plaintiff avers in para. 22 of his affidavit in reply (p. 64 of the Record of Appeal) that the defendant had to date failed to refund to the plaintiff premiums paid for the relevant insurance policy, the fact of which is undisputed by the defendant. The plaintiff further submitted that the defendant's failure to refund the premium paid by the plaintiff in respect of the relevant insurance policy was inconsistent with its claim that it was entitled to repudiate the relevant insurance policy. Paragraph 467, *Halbury's Laws of England*, 4th edn, vol 25 stipulates that:

> 467. Return of premiums when policy voidable. Where a policy is obtained by misrepresentation or non-disclosure of material facts it is a valid and binding contract unless and until the insurers discover the true facts and, on discovering them, elect to avoid it. If, where there has been no fraud, they elect to repudiate a continuing insurance they nullify the contract from the beginning and thereby sacrifice any premiums which they have collected. However, in the case of a renewable insurance each renewal is a new contract and the premium returnable is limited to that paid for the last renewal, as the risk has, in fact, been fully borne by the insurers throughout all the earlier years.

Another point is that the defendant stated that the judgment entered against them for the sum of RM200,000 was irregular as it was not representative of the market value of the vehicle and as such was in excess of what was due from the defendant to the plaintiff. The defendant presented exhs. "JL-6" and "JL-7" (p. 49 and 51 respectively of the Record of Appeal) as evidence of the market value of vehicles similar to that which was the subject matter of the insurance policy. The plaintiff sought to draw the attention of the court that "JL-6" and "JL-7" were dated 27 May 1998 and 2 June 1998 respectively. Although the defendant sought to rely on para. 2, Section A of the relevant insurance policy (p. 36 of the Record of Appeal), neither dates were representative of the date of loss as the theft of the plaintiff's vehicle had occurred on 6 April 1998 as pleaded in para 7 of the plaintiff's statement of claim (p. 7 of the Record of Appeal). I am of the view that the *bona fides* and conduct of the defendant in respect of the application is questionable. The plaintiff stated that the said vehicle was purchased on 13 March 1998 for a sum of RM221,820 as indicated in exh. "CSB-2" at p. 72 of the Record of Appeal and the loss had occurred only some three weeks thereafter. It is therefore in my view that the sum of RM200,000 could not be said to be excessive and did not render the judgment for the same irregular.

The default judgment drawn against the defendant was in part for a final judgment of the sum of RM200,000 ("the first limb") and in part for damages to be assessed together with costs to be determined ("the second limb"). The plaintiff prayers for damages in the statement of claim are distinct from that of the claim for the sum of RM200,000. The first limb of the default judgment and the second limb of the same therefore stood independent of one another. In the premises, even if the first limb of the default judgment ought to be set aside on account of the alleged irregularity, the second limb ought to be allowed to stand as that part of the default judgment is regular and in view of the fact that the defendant presented no defence on the merits.

Order 13 r. 5 of the Rules of the High Court 1980 provides:

> 5. Where a writ issued against any defendant is indorsed with two or more of the claims mentioned in the foregoing rules, and no other claim, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter against that defendant such judgment in respect of any such claim as he would be entitled to enter under these rules if that were the only claim indorsed on the writ, and proceed with the action against the other defendants, if any.

In *Panwell Investments Pte. Ltd. v. Lau Ee Theow* [1995] 3 SLR 137 the Singapore High Court held:

(2) Under O. 19 r. 3, a plaintiff was entitled to enter interlocutory judgment for damages to be assessed and costs in default of defence to be filed, where the plaintiff's claim against a defendant was 'for unliquidated damages only'. The word 'only' meant 'solely', or as an alternative remedy which was able to stand up independently on its own, each case being considered in the light of its pleaded facts and claims made, with all ancillary, ie, subordinate, relief being disregarded.

(3) The respondent here had other claims, the most material being prayers (c) and (d). It was clear that any claim for damages by the respondent was entirely dependent upon an exercise being carried out in respect of these prayers and the making of a finding or findings in his favour concerning the various transactions executed on behalf of the respondent as were set out in the appellants' statement of claim. The respondent's counterclaim was therefore not in the circumstances for 'unliquidated damages only'.

In the instant case the plaintiff's claim for damages to be assessed was separate and distinct from that for the said sum of RM20,000 and it was a claim which was able to stand independently on its own, as opposed to the circumstances in the case of *Panwell* above where the claims were held to be entirely dependent on the other claims. The second limb of the default judgment was for all purposes and intent entered regularly and in the absence of any defence on the merit presented by the defendant, the default judgment to the extent of the second limb ought to be allowed to remain. And I hereby order accordingly.

To conclude I am of the opinion that the defendant had failed to show any defence on the merit. The affidavit evidence shows that the agent for the defendant had from inception, knowledge of the fact of the theft of the plaintiff's other vehicle. The defence of non-disclosure of material fact, entitling the defendant to repudiate liability under the relevant insurance policy, therefore failed. In any event, the facts of the theft of the plaintiff's other vehicle and of the plaintiff's ownership of two other cars cannot in the circumstances be said to be material so as to lead to an inference that the vehicle insured by the defendant in this case was not an ordinary risk. Where the judgment for the sum of RM200,000 is concerned, the defendant had failed to show that the sum was not representative of the value of the vehicle at the material time. The *bona fides* and conduct of the defendant in the application is questionable. Be that as it may, the second limb of the default judgment, being distinct from the first limb of the same, ought to be allowed to stand in the absence of any defence on the merit. It is trite that the discretion of the court in an application to set aside a default judgment is wide and unconditional. The primary consideration in exercising the discretion is

whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point setting aside a judgment if the defendant has no defence, and because if the defendant can show merits, the court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication. From the case of *Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc. The Saudi Eagle* [1986] 2 Lloyd's Rep. 221, CA at p. 223, the following proposition may be derived:

a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.

In the circumstances, the appellant's appeal is hereby allowed with cost and the decision of the Session Court Kuala Lumpur dated 14 December 1999 is set aside.